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Governor

OFFICE OF THE APPELLATE DEFENDER STATE OF MONTANA

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To: Montana Public Defender Commission

From: Wade Zolynski, Chief Appellate Defender

RE: Office of the Appellate Defender Report to the Commission

The Commission appointed me Chief Appellate Defender May 16, 2012. The Office of the Appellate Defender (OAD) consists of a Chief Appellate Defender, nine Assistant Appellate Defenders and two support staff. We have received approval to hire one additional modified support staff. That position is currently vacant. We also contract for appellate services with private counsel. The following is my fifth report to the Commission:

1. **The State of the Office of the Appellate Defender.**

- a. **Turnover.** One attorney resigned from OAD during the first quarter of FY 14. The attorney's tenure with the office was approximately seven months. I remain optimistic that attorney pay increases (discussed in more detail below) will decrease the excessive turnover OAD has experienced for the past several years. Nearly every departing attorney during my tenure as Chief resigned citing low pay and excessive workload. Zero support staff resigned during the first quarter of FY 14. Note, however, that all of OAD's support staff joined the agency within the past seven months. My active push to improve morale (reported in my July Report to the Commission) continues.
- b. **New Cases Continue to Increase.** During the first quarter of FY 14, which ended on September 30, 2013, we opened 74 new cases. By comparison, we opened 63 new cases during this same period last fiscal year. Should new cases continue to increase at the current pace, we will open 296 new cases this fiscal year compared to 270 cases opened last fiscal year. OAD had 248 pending cases on September 30, 2013 (the last day of the first quarter of FY 14).

Tables – new cases by month and new cases by case type are below:

Month		No. of Cases Opened				
July		33				
August		20				
September		21				
Total		74				
Month	CR	DN	DJ	DG & DI	PCR	Writ
July	25	2	1	1 (DG)	4	0
August	15	1	1	3 (DI)	0	0
September	10	8	1	2 (DI)	0	0
Totals	50	11	3	6	4	0

CR = Criminal
DN = Dependent and Neglect
DJ = Juvenile
DG = Guardianship
DI = Involuntary Commitment
PCR = Post-conviction Relief

- c. **Closed Cases.** OAD suffered 150% turnover in support staff in FY 13. Closing cases within our system necessarily became a low priority while other tasks directly related to client representation were completed. As a result, cases in which the appellate process has ended have not yet been closed in our system. As the table below illustrates, we have recently established a brief period of stability and have been able to start closing cases that accumulated during the period of turnover. Hence, the 62 cases closed in September. Staff will continue working on the remaining backlog of cases in need of closing.

Month	Cases Closed
July	2
August	1
September	62
Total	65

- d. **Case Weights.** Due to excessive turnover and increased new cases, attorneys are carrying significantly larger case loads. Per our case weighting system, five of the nine assistant appellate defenders have a caseload above nationally

recommended standards. Standards recommend 22 case units per year. One assistant appellate defender was assigned 60 units in FY 13. Two others were assigned 30 units in FY 13. The average units carried by attorneys with weights above the national standard are 33. The mean of those above the national standard is 45 units. As is apparent, some attorneys are carrying significantly more than the 22 units recommended for effective assistance of appellate counsel. As a result of the increased attorney caseloads, extensions have increased. It is not uncommon for five extensions to be requested before a brief is filed. At times six extensions are necessary. Once, a seventh extension was requested. Appellant's cases should not be delayed so significantly.

Because the office's case weighting system is new, case weights vary (sometimes significantly) from attorney to attorney. In order to address this disparity and to lighten the load on those attorneys with units above the standard, I have ceased assigning cases to several assistant appellate defenders. I have increased the load being carried by other assistant appellate defenders who are at or just below the standard, and I have contracted additional cases out in order to provide representation to all cases in which we are assigned.

2. **OAD's Pay Plan.** Based on the 2013 legislative appropriation, OAD has adopted a new pay plan and moved its attorney staff into a new career ladder which increases attorney pay. OAD's new pay plan does not substantially differ from that of OPD's Trial Division. OAD's pay plan became effective October 1, 2013.
 - a. **Goal.** The goal of OAD's pay plan is to compensate attorneys at a rate that is competitive in the market based on experience, job responsibilities, and OAD's ability to pay. Specifically, OAD shall seek to compensate attorneys at a level that is comparable with attorneys employed by other state agencies, especially the Appellate Bureau of the Montana Attorney General's Office.
 - b. **Purpose.** OAD's pay plan serves many purposes, the most pressing is the need to reduce attorney turnover.
 - c. **Attorney I, II, and III Designations.** OAD's pay plan creates three levels of attorneys – Attorney I, Attorney II, and Attorney III. Each level progressively increases the complexity of cases assigned to that attorney as well as the attorney's level of responsibility within the office.
 - d. **Attorney III Designation.** The Attorney III designation was intended to spread OAD's institutional knowledge beyond the Chief Appellate Defender. Doing so makes OAD's operations more easily sustained even when the agency experiences excessive turnover. The Attorney III designation was also designed to lessen the workload placed on the Chief Appellate Defender. As has been discussed in previous commission reports, decreased workload on the Chief Appellate Defender will help prevent turnover in the Chief Appellate Defender position due to workload related stress. Currently the workload placed on the

Chief Appellate Defender is too large to be sustained over time. The Attorney III designation is described as follows within the pay plan:

Attorney III. Attorney III's are those who regularly produce exemplary work and who are committed to meeting the highest ethical standards. Attorney III's shall regularly handle OAD's most complex cases. Attorney III's must demonstrate a willingness and ability to serve as a leader or mentor to other attorneys and staff, and to advocate for OAD's interests and the interests of its employees as determined by the Chief Appellate Defender. Attorney III's shall perform administrative and policy oriented duties when requested by the Chief Appellate Defender. For instance, when requested, an Attorney III may perform tasks that include but are not limited to the following -- discussing and shaping office policy, discussing otherwise confidential personnel matters within OAD with the Chief Appellate Defender, acting as Interim Chief when the Chief Appellate Defender is unavailable, appearing before legislative bodies, assigning appellate cases to assistant appellate defenders, sitting on OAD's writ committee, and mentoring less experienced assistant appellate defenders. Absent a specific grant of authority, Attorney III's shall not possess authority to make executive decisions on behalf of OAD. Attorney III's shall not be authorized to hire, fire, or discipline OAD staff. Executive decision making remains a duty statutorily assigned to the Chief Appellate Defender with the oversight of the Public Defender Commission. Attorney II's receiving a promotion to Attorney III shall receive a recalculation of relevant experience on the date of promotion. Attorney III's shall receive credit for relevant experience up to 10 years. Once placed into Attorney III status, no additional movement within the ladder is automatic. Any additional movement is subject to a positive performance evaluation by the Chief Appellate Defender. Whenever possible, OAD shall take an Attorney III's administrative duties into account when determining the Attorney III's appropriate case weight. For additional details please consult the Attorney III job description.

- e. **Eileen Larkin and Koan Mercer Promoted to Attorney III.** Promotion to Attorney III status is a matter within the Chief Appellate Defender's discretion. I have promoted Eileen Larkin and Koan Mercer. Eileen Larkin has worked as an assistant appellate defender since December of 2009. Previous to joining OAD, Eileen spent six years clerking for a district court judge in Ravalli County. Koan Mercer began working at the county run Missoula Public Defender Office in October of 2004. Koan remained following state assumption of Montana's public defender function. Koan joined OAD in February of 2008. Both Eileen and Koan regularly handle OAD's most complex cases, produce exemplary work, and meet the highest ethical standards. Both exhibit the judgment necessary to assist me in administrative and policy oriented matters. I also trust the assistant appellate defenders will respect both Koan's and Eileen's judgment and their authority.
- f. **Relevant Experience Date.** Almost immediately upon my appointment as Chief Appellate Defender, several assistant appellate defenders voiced disapproval of the way OAD was determining experience. Because one's level of experience

directly impacts one's compensation, a number of attorneys were paid less than they would be if their experience was calculated accurately. For example, if an attorney started employment on July 6 and relevant experience was calculated on July 1, that attorney would not receive a pay raise and lost nearly a year of pay at the higher level. In order to remedy the above problem OAD placed the following language into its pay plan:

Relevant experience shall be calculated accurately. OAD shall no longer calculate relevant experience on one set date (for example - July 1 or October 1). Instead, relevant experience dates specific to each attorney shall be determined at hire and shall indicate the precise date an attorney moves within the pay ladder. Those promoted to Attorney III shall receive a new relevant experience calculation at the time of their promotion.

Attorney staff within OAD agreed to delay their pay increases until October 1, 2013 in order to create a savings that off-sets the increased costs of accurately calculating relevant experience. The additional costs to OAD over this biennium were largely covered by the savings created by delaying attorney pay increases.

3. **Management Activity.** Since my last report as Chief Appellate Defender, I have hired one assistant appellate defender, partly implemented the use of Westlaw as OAD's research tool, and participated as an instructor at OPD CLE training seminars.
 - a. **Hiring.** As mentioned above, OAD lost one assistant appellate defender to turnover during the first quarter of this fiscal year. I hired Chad Vanisko to replace the departing attorney. Chad received his B.A. from Carroll College in 1994 and his J.D. from Vanderbilt University in Nashville, TN in 2002. Following graduation from law school Chad worked for a law firm in California, for Browning Kaleczyc in Helena, and as a member of his own firm. Most recently Chad worked as a trial attorney at Butte OPD. Chad brings a depth of experience to OAD and we look forward to working with him.
 - b. **Westlaw.** Starting July of this year, OAD began transitioning to using Westlaw as its research tool. Westlaw has several distinct advantages for OAD. First, Westlaw has a brief bank. Operating an appellate office without a brief bank is like navigating a boat with oars instead of a motor – it's inefficient. The Public Defender Commission had proposed a budget of approximately \$80,000 per year to create and maintain an appellate brief bank. Westlaw's brief bank uses an internet like key word search and interfaces internal briefs with legal authority in permitting the user to search both internal briefs and authority simultaneously. Second, Westlaw has a "document drafter" function which permits support staff to format appellate briefs in minutes. Formatting briefs using Word (which is how the office currently formats) is a complicated time consuming process. Third, Westlaw's research platform is easy and efficient and produces amazing results. All of Westlaw's functions should be live in OAD by the end of the

calendar year. The cost, including the brief bank and its other functions, is around \$10,000 per year.

- c. **Instructing at OPD CLE training seminars.** During the first quarter of this fiscal year, I participated as an instructor at OPD CLE training seminars. Communication between the appellate office and the trial office is essential. Appellate attorneys spend the bulk of their working hours reading trial level transcripts from all over the state, and in researching and writing about the areas of law in which OPD practices. Therefore, OAD's attorneys are well positioned to recognize trends in the law, assist in substantive learning of the law, and assist in instructing preservation of the record for appeal. I recently participated in one "boot-camp" training, one investigator level training, and at OPD's annual conference this month. My presentations involve substantive law and preservation of the record. Other members of my staff also participated in OPD's annual conference. Eileen Larkin and Nicholas Domitrovich presented on legal research. Koan Mercer presented on recent appellate decisions impacting OPD's practice.

4. Positive Outcomes and Important Pending Cases.

- a. **Positive Outcomes.** OAD proved successful in several Montana Supreme Court opinions. The first case is *State v. Brothers*, 2013 MT 222. Brothers was represented on appeal by former assistant appellate defender (and current assistant public defender Region 4, Helena) Jonathan King. Noel Larrivee of OPD acted as counsel at the trial level. The second case is *State v. Rogers*, 2013 MT 213. Rogers was represented on appeal by assistant appellate defender Eileen Larkin. Chris Daly of OPD acted as counsel at the trial level.
 - i. ***State v. Brothers*, 2013 MT 222. The State is not a victim, and therefore, it cannot be awarded restitution for the cost of extraditing the defendant.** The State charged Brothers with sexual assault, incest, and indecent exposure on September 1, 2010. *State v. Brothers*, 2013 MT 222, ¶ 4. On January 10, 2011 Brothers was arrested in New Mexico. *Brothers*, ¶ 4. Later, Brothers was extradited to Montana. Brothers reached a plea agreement. *Brothers*, ¶ 4. At sentencing, the State requested Brothers pay \$1,069.02 in restitution for the costs of extradition. *Brothers*, ¶ 5. The State offered no affidavit or testimony establishing the amount of restitution. *Brothers*, ¶ 5. Defense counsel objected that this restitution was just "brought up." *Brothers*, ¶ 5. The Supreme Court agreed that restitution cannot be awarded without either sworn testimony or an affidavit establishing its existence. The Court further held that pursuant to *State v. Jay*, 2013 MT 79 and Mont. Code Ann. § 46-18-243(2)(a), the State is a victim "only when that entity suffers property damage in the commission of a crime, or incurs costs in the investigation or apprehension of an escaped person." Here, the State's expenses were not the result of property damage or the result of the investigation or

apprehension of an escapee. *Brothers*, ¶ 13. Therefore, the District Court lacked authority to order restitution be paid to the State. *Brothers*, ¶ 14.

- ii. ***State v. Rogers*, 2013 MT 221. The State is not permitted to question the defendant about his prior criminal history.** Following a three day trial, a Missoula County jury convicted Rogers of eight criminal counts, including sexual intercourse without consent, partner or family member assault, unlawful restraint, and violation of a no contact order. *State v. Rogers*, 2013 MT 221, ¶ 1. At trial, Rogers testified. *Rogers*, ¶ 19. On cross examination, the prosecutor -- Jason Marks -- asked “when you said you have kind of a checkered past, that didn’t quite cover the whole story did it?” *Rogers*, ¶ 20. Rogers answered, “Do you want to prosecute me on my past or this charge.” *Rogers*, ¶ 20. Marks then asked, “You’ve got two partner or family member assaults you were convicted of?” *Rogers*, ¶ 20. Rogers indicated that was true. *Rogers*, ¶ 20. Marks proceeded and asked, “I’m assuming those [bar fights] are the misdemeanor assaults on your record?” *Rogers*, ¶ 20. Continuing, Marks asked Rogers, “And how many women is it you’ve been charged with raping?” *Rogers*, ¶ 21. Rogers answered, “Oh, five, ten, twenty – I don’t know. You tell me – actually, two – years ago. Fifteen years ago, I was accused of it. I was acquitted of it, and charges were dismissed, and [S.M.’s] . . .” At that point, Marks interrupted and stated, “You were convicted at trial, and it went up [and was reversed] on appeal. Let’s be clear.” *Rogers*, ¶ 21. Rogers argued the District Court “erred and prejudiced [him] by allowing the State to inquire into his past criminal history, including matters that were reversed on appeal.” *Rogers*, ¶ 30. Rogers argued the State’s questioning violated Rule 404(b). *Rogers*, ¶ 30. The Court held that neither the District Court nor the State offered any basis for admissibility of Roger’s entire violent criminal history. *Rogers*, ¶ 35. The Court further held the District Court’s error was prejudicial to Rogers. *Rogers*, ¶ 45. As a result, the Court reversed Rogers’ convictions and remanded for a new trial. *Rogers*, ¶ 46.

b. Important Pending Cases.

- i. *In the Matter of B.W.* (DA 12-0618). Assistant appellate defender Kristen Larson represents the youth B.W. Kristen argues joint and several liability for restitution cannot be ordered because criminal mischief by common scheme does not make one actor liable for the conduct of others – that requires an accountability or conspiracy theory. Briefing is nearly complete.
- ii. *State v. Garding* (DA 11-0763). Assistant appellate defender Eileen Larkin is first chair on this case. I acted as second chair. We argue the district court erred by applying the rules of civil procedure instead of the rules of criminal procedure in order to exclude Garding’s expert (a

forensic pathologist) from testifying about some of the decedent's injuries. We also argue the district court erred in not permitting Garding to cross examine an alleged eye witness/snitch about his PFO status, which he avoided by agreeing to testify against Garding.

- iii. *Randall Jay Dugan v. State of Montana*. This matter was on petition for writ of certiorari at the Supreme Court of the United States. Kristin Larson had represented Dugan before the Montana Supreme Court winning reversal. The Montana Supreme Court struck a portion of the privacy in communications statute as unconstitutional, but disagreed the statute was unconstitutional on other grounds. The United States Supreme Court denied the petition for certiorari, likely because the State dismissed the charge against Dugan after the petition was filed.